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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 341.

OTIS HILLARY RITCH,
Petitioner,

versus

NASHVILLE BRIDGE COMPANY,
Respondent.

REPLY

To Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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PETITIONER'S REPLY.

Respondent's argument of the first of the two questions presented requires brief answer.

Any verdict which is contrary to the great weight of the evidence is, of course, due to be set aside under the law of Alabama. This state also applies the common law principle that empowers judges to set aside verdicts

which they deem manifestly unjust.' In no way does petitioner dispute these rules; they simply do not control the question which is now before the court.

The previously cited Alabama opinions clearly substantiate the principle originally urged by petitioner, i. e., under Alabama law a scintilla of evidence furnishes sufficient support for a verdict so long as it does not conflict with the great weight of the evidence. Nothing contained in the cases cited by respondent justifies any contrary conclusion.[1] Rather than sustaining its erroneous contention, respondent merely confuses the issue.

The Fifth Circuit held here that there was insufficient evidence to support the verdict—not that the verdict was against the great weight of the evidence or that it was manifestly unjust. The court's conclusion was based on its expressed holding that it is the federal and not the state test of sufficiency which obtains. That holding squarely presents the issue petitioner has raised.

The opinion of the Fifth Circuit in this respect was not based on any novel distinction which is limited to Alabama cases. The rule in this circuit is simply that the test of sufficiency of evidence in diversity cases is not to be taken from state law.[2]

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[1] It is petitioner's position that is supported in the leading case of *Cobb v. Malone*, 92 Ala. 630, 9 So. 738, which is among the cases cited by respondent (respondent's brief, p. 5, footnote 6): Assuming a case to have been properly submitted to the jury, it was held that "* * * the decision of the trial court, refusing to grant a new trial on the ground of the insufficiency of the evidence, or that the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust."

[2] That the Fifth Circuit's holding is a general one, applicable to all cases, including those not involving the scintilla rule, is clearly demonstrated by its language and holding in *New York Life Insur-*

This question does not extend to the relative functions of a judge and jury or to the mechanics of the judicial process. Application of the state test of sufficiency of the evidence would neither disrupt the operation of a district court, affect the judge's responsibility to determine whether particular evidence does or does not meet the applicable test of sufficiency, nor diminish his power to direct verdicts. The question is simply whether state or federal law determines the quantum of evidence sufficient to meet the plaintiff's burden in diversity cases. Respondent does not dispute that on this question there is a clear split among the circuits.

If the confusion wrought by respondent succeeds in misleading the court into believing that the Alabama situation presents an added problem, then petitioner submits that this would be the logical starting place for the resolution of the conflict among circuits, for having resolved it in this case, the resultant rule could be applied in all cases. Even if such an added problem did exist, variations in state law would certainly not justify a unique distortion of the **Erie** principle applicable only in the district courts of one state.

Respondent's citation of para. 38.10 from 5 **Moore's Federal Practice**, 2nd Ed., points up the importance of the court's action in this field, since as is shown by the cases originally cited, Professor Moore's position is in direct conflict with that of at least five of the circuits.

As in our original petition, we reserve detailed argument on the merits of this question for a more appropriate

ance Company v. Sparkman (CCA-5, 1939), 101 F. 2d 484. The point is further illustrated by its reliance in *Pogue v. Great Atlantic & Pacific Tea Company* (CCA-5, 1957), 242 F. 2d 575, a case which does not involve the scintilla rule, or its prior holding in *Reuter v. Eastern Air Lines* (CAA-5, 1955), 226 F. 2d 443, a case which does involve the scintilla rule.

stage of this proceeding. We submit, however, that the petition has clearly presented an important conflict among the circuits that should be resolved.

Respectfully submitted,

.....

OTIS HILLARY RITCH,
Pro Se.

State of Missouri,)
St. Louis County.)

I, J. Guy Hood, depose that by direction of counsel for petitioner I have on this the 19th day of October, 1960, served a copy of the foregoing Reply on the respondent by mailing a copy via U. S. Air Mail, postage prepaid, to Frank M. Young, Esquire, Attorney for Respondent, at 805 First National Building, Birmingham, Alabama.

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Subscribed and sworn before me at St. Louis, Missouri, this 19th day of October, 1960.

.....

Notary Public.

My commission expires June 9, 1962.